No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

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ARGUMENT

I. CALIFORNIA'S LCM RESTRICTIONS DO NOT VIOLATE THE SECOND AMENDMENT

1. Plaintiffs' central argument is that "[b]ecause magazines that can hold more than 10 rounds are 'typically possessed by law-abiding citizens for lawful purposes,' the Second Amendment protects them." Plaintiffs Opening Supplemental Brief (PSB) 1 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008)). In plaintiffs' view, California's ban on the "possession of such magazines" is categorically unconstitutional because "the state cannot banish what the Constitution protects." PSB 1. But the core concern of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. And California's LCM restrictions do not "banish" that right; to the contrary, California generally allows law-abiding adults to possess and defend themselves and their homes with as many approved firearms, as much ammunition, and as many authorized magazines as they want. *See* Attorney General's Opening Supplemental Brief (ASB) 2, 21.

Nor is Section 32310 "[j]ust like [the] ban on handguns" that the Supreme Court invalidated in *Heller*. PSB 7. Unlike handguns, LCMs are not the "quintessential self-defense weapon," *Heller*, 554 U.S. at 629; indeed, their popularity has spiked only in the last few decades, *see* ASB 11-12. And unlike the D.C. law, California has not "ma[de] it impossible for citizens to use

[handguns]"—or approved long guns—for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. All California has done is to limit the number of rounds per magazine to no more than 10. That is (far) more than the 2.2 rounds that individuals typically need to defend themselves in a self-defense situation, *see* 2-ER-286-93; and in those rare instances in which persons need additional rounds for self-defense, they may reload with a fresh magazine or continue firing using another firearm, *see infra* pp. 5-6.

Given those differences, it plainly does not "follow[] . . . from *Heller*" (PSB 7) that California's LCM restrictions are invalid. Instead, Section 32310 must be reviewed under the two-step framework that this Court has articulated for reviewing Second Amendment claims. *See Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). Plaintiffs do not appear to question that the two-step framework is an appropriate means of constitutional analysis in this context. And a proper application of Section 32310 under that framework confirms that the law is constitutional.

2. At step one, plaintiffs offer a simplistic narrative of the history of LCMs. *See generally Young*, 992 F.3d at 783 (step-one analysis focuses on the "historical understanding of the scope of the right"). They assert that "magazines capable of holding more than ten rounds of ammunition . . . enjoy a long historical tradition" and that "there is no similar tradition of government regulation." PSB 5. But the

modern LCMs that prompted governments across the country to adopt capacity restrictions are materially different—and present a far greater threat to public safety—than the historical examples cited by plaintiffs. *See* ASB 10-12. As even plaintiffs acknowledge, "new semi-automatic pistol designs with detachable magazines" did not replace revolvers as the predominant handgun until well into the twentieth century; and the AR-15 was not introduced until 1963 and did not increase in "circulation and popularity" until the "1970s and 1980s." PSB 5. As new technologies allowed LCMs for such weapons to become cheaper, more compact, more reliable, and more widely available—and as they were used in crimes and mass shootings with far greater frequency—governments across the Nation moved swiftly to restrict the capacity of magazines. *See* ASB 2-3, 11-13. Given those circumstances, the court could properly treat those restrictions as "longstanding" under *Heller*. *See* ASB 14-15.

3. Even if the historical record were not enough to resolve this case, plaintiffs' challenge would fail at step two. *See* ASB 15-30.

a. Plaintiffs argue that there is no need for the Court to conduct means-ends scrutiny because a ban on LCMs is "categorically unconstitutional." PSB 7. As discussed above, however, there is no credible argument that a prohibition on LCMs "'amounts to a destruction of the Second Amendment right'" described in *Heller*. *Young*, 992 F.3d at 784. So this Court's en banc precedent requires it to

"apply intermediate scrutiny" at step two (unless plaintiffs can establish a "severe[]" burden on the "core of the Second Amendment right"). *Id.*; *see infra* pp. 5-10.

Plaintiffs seek to avoid that standard of review by pointing to "a long line of cases rejecting the notion that the government may flatly ban constitutionally protected activity just because it could lead to abuses." PSB 7; *see* PSB 7-9 (collecting cases). But Section 32310 is not comparable to laws that "prohibit printing presses" or that "empower police officers with unlimited search authority." PSB 8. A ban on printing presses, for example, would imperil the freedom of expression that lies at the core of the First Amendment. *See, e.g.*, *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 688 (9th Cir. 2017) (en banc) ("Selling, publishing, and distributing books and other written materials" is "*itself* expressive activity"). Granting police unlimited authority to search homes would destroy the "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" that lies "[a]t the very core of the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (internal quotation marks omitted). In contrast, a law prohibiting magazines of 11 rounds or more—but allowing law-abiding adults to possess as many authorized firearms and magazines with lesser capacity as they wish—does not "materially interfer[e] with the ability to use arms in self-defense." Volokh, *Implementing the Right to Keep and Bear Arms for Self-*

Defense, 56 UCLA L. Rev. 1443, 1486 (2009); *see also id.* at 1489; ASB 16-23. Moreover, the "inherent risk that firearms pose to the public distinguishes their regulation from that of other fundamental rights." *Young*, 992 F.3d at 827. While analogies to other constitutional rights may prove useful in some respects, *see, e.g.*, *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014), it would be "imprudent to assume that" each of the "principles and doctrines developed in connection with the First Amendment" (or other fundamental rights) "appl[ies] equally to the Second," *Young*, 992 F.3d at 828 (internal quotation marks omitted).

b. Plaintiffs next contend that "[i]f the Court were to apply a level of scrutiny, only strict scrutiny could suffice." PSB 9. They assert that Section 32310 imposes the kind of severe burden that is necessary to trigger strict scrutiny because California "flatly bans" LCMs. PSB 2. As Judge Ikuta has explained, however, "firearms regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not." *Jackson*, 746 F.3d at 961. Here, California's regulations leave open abundant alternatives for self-defense: law-abiding adults may possess an array of authorized firearms and magazines, *see* ASB 2, 21, which would provide them with ample ammunition to defend themselves, *see* 2-ER-286-93 (armed self-defense situations involve average of 2.2 shots; 97% of situations

involve 5 shots or fewer). In those "extremely rare instances when more" than 10 rounds are needed for self-defense, the ability to use another firearm or "to switch magazines in seconds, which nearly all semiautomatic weapons possess," allows for continued firing. Volokh, *supra*, at 1489; *cf. Jackson*, 746 F.3d at 966 (requirement to store firearms in locked container or disabled with trigger lock imposes a "minimal burden on the right to self-defense" because it "causes a delay of only a few seconds").[1]

Plaintiffs respond (PSB 14-15) by discussing the report of their expert, who opined that California's LCM restriction will "impair the ability of citizens to engage in lawful self-defense." 7-ER-1708; *see* 7-ER-1708-1712. But his opinions about the difficulties of "stop[ping] to change magazines while under attack" (PSB 14) were not supported by empirical evidence or any cited authorities. Moreover, plaintiffs have not identified any material number of situations in which someone needed to fire more than 10 rounds in self-defense. And the record evidence shows that those situations are vanishingly rare—just 2 out of the 736 armed self-defense incidents reported in the NRA Armed Citizen database between January 2011 and May 2017, both occurring outside California.

[1] Nothing about the State's position would "'justify a total ban on firearms kept in the home.'" PSB 12. As this Court has made clear, the constitutional analysis involves an assessment of the availability of alternative means for armed self-defense.

2-ER-286-88. For his part, plaintiffs' expert admitted that he did not know of "any examples in which Californians had been unable to successfully defend themselves with a firearm that did not have a large capacity magazine." 3-ER-714.

c. Plaintiffs also argue that Section 32310 "could not satisfy . . . even intermediate scrutiny." PSB 9. That argument is unpersuasive.

To begin with, plaintiffs almost entirely ignore (PSB 9-11) this Court's repeated pronouncements on how intermediate scrutiny should apply to Second Amendment claims. In this context, intermediate scrutiny requires "(1) a significant, substantial, or important government objective, and (2) a 'reasonable fit' between the challenged law and the asserted objective." *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018); *see also United States v. Chovan*, 735 F.3d 1127, 1136, 1139 (9th Cir. 2013). The State "must show that the regulation 'promotes a "substantial government interest that would be achieved less effectively absent the regulation"'"; but it need not show that the law is the "least restrictive means." *Pena*, 898 F.3d at 979.

And contrary to plaintiffs' contention that the State is "entitled to no deference when assessing the fit between its purported interests and the means selected to advance them," PSB 11, this Court has made clear that the legislature's "predictive judgments" on such issues must be afforded "substantial deference." *Pena*, 898 F.3d at 980 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S.

180, 195 (1997)); *see also* ASB 24 (collecting out-of-circuit cases). That is appropriate: As noted, intermediate scrutiny applies when a law does not severely burden the core Second Amendment right to self-defense. *Jackson*, 746 F.3d at 961. Such laws are properly "subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution," *Turner*, 520 U.S. at 213, and "'reasonable opportunit[ies] to experiment with solutions to admittedly serious problems,'" *Jackson*, 746 F.3d at 966; *cf. Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479-481 (1989) (under commercial speech doctrine, elected branches have "leeway" to make "reasonable" judgments regarding the "'"fit" between the legislature's ends and the means chosen to accomplish those ends'").

With respect to Section 32310, plaintiffs acknowledge that California has an "important interest in promoting public safety and preventing crime," PSB 10, but contend that the State has not "offer[ed] evidence" establishing that Section 32310 "will in fact further its stated interests." PSB 12. That is incorrect. Among other things, the record demonstrates that mass shooters who use LCMs inflict nearly three-and-a-half times the number of casualties as those who do not. 3-ER-756-57; *see generally* ASB 24-26 (collecting record citations on threats posed by LCMs to the public and police). States with LCM restrictions have seen "a far lower rate of incidence" of gun massacres—and casualties from those shootings that do occur—than States without them. 2-ER-364. At a minimum, California's conclusion that

its LCM restrictions will reduce the number of civilians and police officers injured and killed is a "reasonable inference[] based on substantial evidence." *Pena*, 898 F.3d at 1001 (Bybee, J., concurring in part and dissenting in part). Plaintiffs point to nothing in the record undermining that conclusion.

Instead, plaintiffs cite a 2004 study concluding that the federal restrictions on LCMs that were adopted in 1994 and have since expired did not reduce "violent crime." PSB 13. But the federal law differed materially from Section 32310, including by allowing individuals to possess "grandfathered" LCMs and to transfer them to other people. 2-ER-410. Any "failure to reduce overall LCM use" in crime was "likely due to the immense stock of exempted pre-ban magazines" and the "post-ban imports." 2-ER-415; *see also* 3-ER-691, 2-ER-410 (4.8 million "pre-ban" LCMs were imported into the country between 1994 and 2000; another 42 million "may have arrived after 2000"). Moreover, the 2004 study does nothing to undermine California's conclusion that limiting access to LCMs will reduce the number of people killed and wounded during mass shootings. *See* 2-ER-361 (federal assault weapons ban "clearly had a positive impact in reducing the number and carnage" of mass shootings).[2]

[2] *See also* Donohue & Boulouta, *The Assault Weapon Ban Saved Lives*, Oct. 15, 2019, https://law.stanford.edu/2019/10/15/the-assault-weapon-ban-saved-lives/ ("body count from gun massacres was visibly restrained" when federal ban was in place "and rose sharply after 2004").

Plaintiffs also contend that Section 32310 is not "sufficiently tailored." PSB 10. They emphasize that it applies to "nearly everyone," including those "who lawfully acquired and have lawfully possessed the now-prohibited magazines for decades without incident." PSB 11. That is true, but Section 32310 does not materially impair their ability to engage in armed self-defense. *See supra* pp. 5-6. And exempting those who lawfully acquired LCMs without prior incident would not adequately serve the State's interests: a principal goal of Section 32310 is to lessen the carnage arising from mass shootings, *see* 7-ER-1199-1200, and the reality is that the "shooters in at least 71% of mass shootings in the past 35 years obtained their guns legally," 2-ER-296.

Finally, the fact that other States have opted not to adopt capacity restrictions (PSB 10) does not establish a lack of reasonable fit between Section 32310 and California's compelling public safety interests. Our system of federalism contemplates that different States will make different choices in response to policy concerns. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring). The record here demonstrates a reasonable fit between California's choice and its goal of reducing the number of mass shootings and the number of casualties that result from them. *See* 2-ER-360-65, 2-ER-388-89, 4-ER-1018-19. That choice is not one that our Constitution takes "off the table." *Heller*, 554 U.S. at 636.

II. CALIFORNIA'S POSSESSION BAN DOES NOT VIOLATE THE TAKINGS CLAUSE

Plaintiffs' supplemental brief reprises the argument (not reached by the panel) that the possession ban in Section 32310(c) violates the Takings Clause. PSB 16-23.[3] But plaintiffs do not mention the Third Circuit's recent decision rejecting a Takings Clause challenge to New Jersey's ban on the possession of LCMs. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.* (*ANJRPC*), 910 F.3d 106, 124-125 (3d Cir. 2018). And they fail to advance any persuasive argument that this type of possession ban effects a taking—let alone to identify the kind of "compelling reason" this Court normally demands before it is willing to "create a circuit split." *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017).

"'The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.'" *ANJRPC*, 910 F.3d at 124 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005)). Additionally, a government regulation "may be compensable" if it is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* (quoting *Lingle*, 544 U.S. at 537).

[3] Even if Section 32310(c) were held to effect a taking, that would not support affirmance of the injunctive relief entered by the district court. *See* AOB 53 n.19; Reply Br. 21; *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2176 (2019) ("equitable relief is generally unavailable" where "state governments provide just compensation remedies"); *Sutfin v. State*, 261 Cal. App. 2d 50, 53 (1968) (recovery for taking of "personal" property may be "had through inverse condemnation").

As the Third Circuit recognized, a ban on the possession of LCMs does "not result in [an] . . . actual taking" if "owners have the option to transfer or sell their LCMs to an individual or entity who can lawfully possess" them or to "modify their LCMs to accept fewer than ten rounds." *ANJRPC*, 910 F.3d at 124 & n.32. And California affords both options to owners of previously lawful LCMs. *See* Cal. Penal Code § 32310(d)(2) (owner may "[s]ell the large-capacity magazine to a licensed firearms dealer"); *id.* § 16740(a) (owner may "permanently alter[]" the magazine "so that it cannot accommodate more than 10 rounds"). And plaintiffs themselves have acknowledged that there are "countless articles and videos online on how to modify LCMs to hold 10 rounds" and that "California firearm owners, dealers, and manufacturers [have] made or remade LCMs 'California compliant' through 'permanent alteration'" for more than two decades. 8-ER-1920; *see also* Training Videos, https://www.magazineblocks.com/magento/training-videos (last visited May 31, 2021).

As to the regulatory taking analysis, laws like California's and New Jersey's that allow individuals to modify and keep their magazines do not "deprive the gun owners of all economically beneficial or productive use of their magazines." *ANJRPC*, 910 F.3d at 124. Those laws instead allow gun owners to continue to use those magazines "for [their] intended purpose" and in much "the same way

expected: to hold multiple rounds of ammunition in a single magazine." *ANJRPC*, 910 F.3d at 125.[4]

Indeed, by allowing owners to continue to possess and use LCMs in modified form, Section 32310 is more protective of property rights than other laws that have flatly prohibited the possession of personal property posing a threat to public health or safety—and have withstood takings challenges. *See, e.g.*, *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 364-367 (4th Cir. 2020) (prohibition on possession of "bump stocks" not a taking); *McCutcheon v. United States*, 145 Fed. Cl. 42, 51-57 (Fed. Cl. 2019) (similar); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 410-411 (4th Cir. 2007) (prohibition on previously-legal gambling machines not a taking); *cf. Miller v. Schoene*, 276 U.S. 272, 279-280 (1928) (state-ordered destruction of trees infected by cedar rust not a taking).

Those rulings are consistent with the Supreme Court's "'takings' jurisprudence, which has traditionally been guided by the understanding of our citizens regarding the content of, and the State's power over, the 'bundle of rights'

[4] Unlike New Jersey, California does not authorize individuals to keep and "register those LCMs that cannot be modified." *ANJRPC*, 910 F.3d at 124. Plaintiffs have not identified any circumstances where they (or others in California) have been unable to modify a magazine. If those circumstances ever arise, the constitutional implications could be considered on an as-applied basis.

that they acquire when they obtain title to property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). A "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.* "And in the case of personal property," an owner "ought to be aware of the possibility that new regulation" carrying out the State's police powers "might render his property economically worthless," *id.* at 1027-1028, or even prohibit the continued possession of that property, *see, e.g.*, Temporary Placement of Fentanyl-Related Substances in Schedule I, 83 Fed. Reg. 5188, 5188-5192 (Feb. 6, 2018) (placing certain "fentanyl-related substances" in schedule I of the Controlled Substances Act to "avoid an imminent hazard to the public safety"); *cf. ANJRPC*, 910 F.3d at 124 n.32 ("A compensable taking does not occur when the state prohibits the use of property as an exercise of its police powers rather than for public use.").

Finally, the Supreme Court's decision in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015) does not require a different outcome here. *See* PSB 17-19. That case involved a "clear physical taking": a USDA order requiring the transfer of raisins "from the growers to the Government," with the "[t]itle to the raisins pass[ing]" to a government entity. *Horne*, 576 U.S. at 361; *see also ANJRPC*, 910 F.3d at 124 n.32. Growers subject to that requirement "los[t] the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use, and dispose

of' them." *Horne*, 576 U.S. at 361-362. The same cannot be said of Californians who own prohibited LCMs. They may continue to possess and use the LCMs by permanently altering the magazines to accept no more than ten rounds, Cal. Penal Code § 16740(a), or by removing them from the State, *id.* § 32310(d)(1). Or they may dispose of them by "[s]ell[ing] the large-capacity magazine to a licensed firearms dealer" for fair market value, *id.* § 32310(d)(2), or by removing it from the State, *id.* § 32310(d)(1), and then selling it to another purchaser in a jurisdiction that allows such sales. The only scenario in which they would need to "[s]urrender the [LCM] to a law enforcement agency for destruction" (*id.* § 32310(d)(3)) is if they decided not to exercise their options for continuing to possess, use, or dispose of it.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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